

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1177 of 1989

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Nos. 1 to 5 - No.

CHAMPABEN DATTUBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR PB MAJMUDAR for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1
MR PD DAVE for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 18/01/97

ORAL JUDGEMENT

This petition has been preferred by the divorced woman who has been denied maintenance, under section 125 of the Code of Criminal Procedure, from her former husband respondent No.2.

While considering the petitioner's claim for maintenance the learned Joint Judicial Magistrate,

Rajpipla, has held that the petitioner had voluntarily taken divorce from her former husband respondent No.2. and she, therefore, was not entitled to maintenance under section 125 of the Code. Feeling aggrieved by the above-referred judgment of the learned Magistrate, passed in Misc.Cri.Application No.37 of 1987 on 30th April 1988 the petitioner preferred Criminal Revision Application No.67 of 1988 before the learned Sessions Judge, Bharuch. While considering the petitioner's claim for maintenance the learned Sessions Judge has held that even a divorced woman is entitled to maintenance from her former husband. However, he has held that the petitioner was not willing to stay with the respondent No.2 husband and had deserted the respondent No.2 and, therefore, she was not entitled to maintenance. Feeling aggrieved by the aforesaid judgment and order dated 20th June, 1989 passed by the learned Sessions Judge, Bharuch, in Criminal Revision Application No.67 of 1988 the petitioner has preferred the present petition under Article 227 of the Constitution.

The learned Advocate Mr.Dave appearing for the respondent No.2 has contested this petition and has submitted that the present petition under Article 227 of the Constitution is not maintainable at all. He has submitted that section 397(3) prohibits filing of a second revision and the petition filed under Article 227 being in the nature of second revision, which is prohibited as aforesaid, is not maintainable. In support of his contention, he has relied upon the judgments of this court in the matter of Arvindbhai Patel vs. State of Gujarat and Another (1993(2) GLR 1124) and the judgment of the Supreme Court in the matter of Deepti Alias Arati Rai vs. Akhil Rai and others (1995(5) S.C.C. 751).

In the matter before the Supreme Court the court was considering the scope of the petition under section 482 of the Code in view of prohibition against filing of second revision application under section 397(3) of the Code. The court has held that in view of the prohibition against the second revision under section 397(3) of the Code inherent power under section 482 of the Code could not have been utilized for exercising power expressly barred by the Code. The power of the High Court to entertain petition under Article 227 of the Constitution, when second revision is prohibited under section 397(3) of the Code has been a matter of discussion for a long time. As far back as in the year 1978, the Supreme Court in the matter of Jagir Singh v. Ranbir Singh and another (AIR 1979 S.C.381) has held that the bar of second

revision under section 397 (3) could not be circumvented by filing a petition under Article 227 of the Constitution. In paragraph 6 of the judgment it has been held that: "the power of judicial superintendence under Article 227 could only be exercised sparingly to keep subordinate courts and Tribunals within the bounds of their authority and not to correct mere errors where the statute banned the exercise of revisional power by the High Court, it would indeed require very exceptional circumstances to warrant interference under Article 227 of the Constitution." Thus, where a manifest injustice is done to the litigant under erroneous interpretation of the statute, I would consider it a fit case to interfere under Article 227 of the Constitution.

Mr.Dave has also contended that since the petitioner was not ready to live with the respondent No.2 and his other family members he had to file proceedings for restitution of conjugal rights and in course of those proceedings by way of settlement the petitioner and the respondent No.2 were divorced. Thus, the respondent No.2 being a willing party to the divorce she was not entitled to maintenance under section 125 of the Code. This contention also requires to be rejected.

Section 125 of the Code, inter alia, empowers a wife to claim maintenance from her husband who having sufficient means neglects or refuses to maintain her. The Explanation(b) to the said section 125(1) provides that "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried. Thus, even a divorced woman is entitled to maintenance from her former husband and the question whether the divorce was given by her husband or was taken by the wife, is redundant. Further, the question whether the wife has refused to live with her husband without sufficient reason, would also be besides the point. The question of a woman's living with her husband would arise only during the subsistence of their marriage, and once the divorce takes place, the question of woman's living with her former husband would not arise. In my opinion, therefore, both the courts below have erred in addressing whether the petitioner had sufficient reason to refuse to live with her husband. Once the divorce took place, the petitioner was bound to live separate from her husband and in the event she is unable to maintain herself, the former husband is bound to maintain her.

The question now arises is what should be the amount of maintenance which can be awarded to the

petitioner. Learned Advocate Mr.Dave has contended that the petitioner is a labourer who is earning wages of Rs.7/-per day and could not afford to pay maintenance as was claimed by the petitioner. He has further submitted that considering the earning capacity he was directed to pay maintenance of Rs.3001/- to the petitioner and the minor daughters by the Panch which he had paid. Be it noted that the payment of Rs.3001/- is disputed by the petitioner and the respondent No.2 has not produced any evidence in support of his contention. Further the amount of Rs.3001/- even if it were paid at the time of divorce, if found insufficient, the petitioner would have a right to claim maintenance under section 125 of the Code. Be it noted that petitioner's assertion that he was a mere labourer earning Rs.7/- per day has not been believed by the courts below. In view of the said finding Mr.Dave's contention cannot be upheld.

It has been brought on the records of the matter that the respondent No.2 owned along with his other family members some 20 Acres of land. He was also doing labour work. Considering the income of the respondent No.2 the lower court has allowed monthly maintenance of Rs.150/- to each of the minor daughters of the petitioner and the respondent No.2. Considering these facts, I am of the opinion that the petitioner should be awarded a monthly maintenance of Rs.250/- from the date of her application i.e. 18th April, 1987. The respondent is directed to pay the aforesaid amount of maintenance regularly to the petitioner commencing from 1st February, 1997. He is further directed to pay the arrears of maintenance calculated as directed hereinabove latest before 31st August, 1997.

It is further directed that the respondent No.2 shall pay a sum of Rs.5,000/-(Five thousand) out of the arrears of maintenance calculated as above on or before 31st March, 1997.

Petition is allowed. Rule is made absolute.
